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DAMAGES; BREACH OF CONTRACT; MENTAL SUFFERING. *McBride* v. *Telephone Co.*, 96 Fed. 81 (1899). The complaint in this action for damages stated that while the complainant was away from home his daughter fell ill and the family were in need of a remittance of money. His son, acting as his agent, thereupon sent him a telephone message, stating the facts, and asking him to return as soon as possible. The message was never transmitted, and in consequence, the complaint further alleged, the plaintiff remained ignorant of his child's illness until after her death. Because of his apparent neglect his wife and children became estranged, his home was broken

up and he suffered great mental anguish and distress. There was a demurrer to the complaint, which, by agreement, was argued and submitted for the purpose of testing the question of the proper measure of damages.

The rule laid down in *Hadley* v. *Baxendale*, 9 Exch. 354 (1854), the leading case on this subject, for the measure of damages in actions on contract is as follows: "The damages which one party to a contract ought to recover for breach of it by the other are such as either arise naturally from the breach itself, or such as may reasonably be supposed to have been in the contemplation of the parties, when making the contract, as the probable result of the breach. Any other claims for damages are regarded as too remote. And the same rule applies, *mutatis mutandis*, to actions sounding in tort." Anson, in his valuable work on contracts, *309, fully agrees with this view.

Hanford, the District Judge in the case under discussion, although he cites no authorities in his opinion, seems to follow *Hadley* v. *Baxendale* when he says: "The failure to transmit the message is not the direct or the proximate cause of the disruption of the plaintiff's family." Nor was it the direct or the proximate cause of the daughter's death, as in *Telegraph Co.* v. *Stephens*, 2 Tex. Civ. App. 429, 21 S. W. 148 (1893), where a physician was summoned by telegraph and his arrival delayed until the child died. It was shown at the trial, or at least intimated strongly, that had the physician received the message, and so arrived in time, the child would have been saved. In that case damages were even allowed "for the superadded pain and anguish caused to the parents by seeing their child die without relief."

Judge Hanford then went on to say that even if the plaintiff's trouble was the direct and proximate result of the defendant's negligence, yet the plaintiff could not recover, for such could not be the natural result of a breach of the contract within the contemplation of the parties. He thus again impliedly followed *Hadley* v. *Baxendale*.

The rule seems to be well settled that damages for "nervous or mental shock" are too remote. See Webb's Pollock on Torts, page 54, and the cases there cited. In a few of the States, notably North Carolina, Tennessee, Texas and Indiana, the courts have essayed to compensate in money the grief or regret of the addressee of a telegraphic message negligently delivered too late to permit to attend on the bedside of the ill or the obsequies of the dead, although he has suffered no pecuniary loss or bodily injury. See *Young* v. *Tel. Co.* 107 N. C. 370 (1890), 11 S. E. 1044; *Wadsworth* v. *W. U. Tel. Co.*, 86 Tenn. 695 (1888); *Chapman* v. *W. U. Tel. Co.*, 13 S. W. 880 (1890), and *Reese* v. *W. U. Tel. Co.*, 123 Ind. 294 (1889). *So Relle* v. *Tel. Co.*, 55 Tex. 308 (1881), is the first and leading case on this side; it has been followed, with slight modifications, in all the later Texas cases. The contrary is certainly the sounder doctrine. In *Chapman* v. *W. U. Tel. Co.*, 88 Ga. 763, 15 S. W.

901 (1892), and *Tel. Co.* v. *Rogers*, 68 Miss. 748, 9 So. 823 (1891), the authorities on both sides of the question are reviewed and the right of recovery denied. Judge Thompson has an able article on this subject in 33 Cent. Law Jour. 5 (1891). The notes to *Rwy. Co.* v. *Caulfield*, 11 C. C. A. 571 (1894); *Tel. Co.* v. *Coggin*, 15 C. C. A. 250 (1895), and *Tel. Co.* v. *Morris*, 28 C. C. A. 62 (1897), contain much that is of value on this important subject.

We have no doubt of the correctness of Judge Hanford's decision. The rules that apply to telegraph companies would certainly apply to telephone companies, but we would have enjoyed the learned judge's opinion more had he cited a few, at least, of the many valuable authorities on this point.

To some this case may seem hard, but "hard cases make bad law." In this connection we can do no better than refer to Judge Hanford's words: "If he (the plaintiff) is a kind and dutiful father and husband, the refusal on the part of his wife and children to accept a reasonable explanation of his apparent neglect proves conclusively such perversity and unlovely dispositions in them that the distress and humiliation and loss which the plaintiff alleges he has suffered must be attributed to their unreasonable behavior, rather than to the defendant's breach of his contract."

INJUNCTION; ENFORCEMENT OF AN AGREEMENT NOT TO ENGAGE IN BUSINESS.—The case of *Cook et al.* v. *Brisebois*, *Rapports Judiciares de Quebec*, vol. xvi, page 46 (decided in May last), sheds new light upon the powers of a court of equity to enforce a negative covenant. Cook *et al.* filed a bill in equity to have the defendant, Brisebois, enjoined from continuing in the business of tallow-rendering in the city of Montreal. Brisebois sold his tallow-rendering establishment in Montreal to the complainants. In the agreement of sale there was the following condition: "It is also understood and agreed that Mr. Brisebois will do all he can to turn over his trade to Hughs, Cook & Co., and engages himself not to enter the business again at any time or help any one toward doing so." Soon after, the defendant was actively engaged in the formation of another company; he solicited orders and was well known in his connection with it. But he never held any interest in the company, being employed by it at a weekly salary. The court granted the injunction, restraining the defendant from carrying on or being engaged in the business within the district of Montreal.

Looking at the terms of the contract, it appears to be an agreement in restraint of trade unlimited as to space or time. Such a contract is void, under the most extreme cases. No case has gone further than *Nordenfeldt* v. *Maxim*, L. R. Ap. Cas. 535 (1894), and in that csse the time was limited to twenty-five

years. But in those cases, there has been a reason which does not extend to the present. In all of them, the court has decided that the restraint thus sought to be imposed was necessary and reasonable for the protection of the purchaser in the enjoyment of the article purchased. *Underwood* v. *Barker*, L. R., 1 Ch. D. 301 (1899); *Robinson* v. *Heuer*, L. R. 2 Ch. D. 456 (1898).

Of course, if the court has the right to limit the application of the agreement to the district of Montreal, their restraint does not violate this rule of English law. But we have been able to find no English case which allows the court to limit the scope of the contract, as to space and time, according to any presumed intent of the parties. It is true that the English and American courts have held that a contract which is severable—if a part of it be a reasonable restraint—can be enforced to that extent. If this contract had been not to carry on the business in the district of Montreal or elsewhere, the decree granting the injunction, would have been unexceptionable: *Underwood* v. *Barker*, (supra); *Trenton Potteries Co.*, v. *Oliphant* (N. J.) 39 Atl. Rep. 923 (1898). In the first case, just mentioned, Lord Justice Lindley said: "An agreement in restraint of trade, which is wider than is reasonably necessary for the protection of the person seeking to enforce it, is invalid so far as it is wider than is so necessary, and this may invalidate the whole restraint sought to be imposed, if the clause imposing it is so framed as not to be severable." It would be impossible for the court to justify its decree upon the ground that this contract is divisible, nor does it attempt to do so.

The strongest argument in favor of the decree is to be found in the case of *Avery* v. *Langford*, Kay 663 (1854). The court, in the case under discussion, says that they are warranted, upon the authority of *Avery* v. *Langford*, in limiting the injunction according to the nature of the business. But in that case the restraint as to space and time was admitted to be reasonable, and the only thing the court did allow the character of the business to affect was the meaning of the ambiguous expression "not to set up a trading establishment." It was the same kind of a question that came before the court in *Perls* v. *Saalfeld*, L. R. 2 Ch. D. 149 (1892), when the court endorsed the doctrine laid down in *Avery* v. *Langford*.

Opposed to the decree in *Cook et al* v. *Brisebois* is the authority of *Ward* v. *Byrnes*, (5 M. and W. 547, 1839), which was taken notice of and distinguished in *Underwood* v. *Barker*. There an agreement by the defendant not to engage in the coal business for nine months after the termination of his service with the complainants was held void as imposing a restraint beyond what was reasonable—being unlimited as to space. This case and the present one are flatly upon the same ground. There is an American case, decided in the Circuit Court of the United States, which more nearly supports the case in issue than any English authority: *Hitchcock* v. *Anthony*, 83 Fed. R. 779 (1897). There an agreement not to sell fish or "do any-

thing that will conflict with said coal or fish business of the said Anthony," was held valid, and limited in its application to the area covered by the plaintiff's business. There are, however, marked points of distinction between the two cases.

In the light of this last case, the decision of the Circuit Court in a case like the present might be in favor of an injunction. As for the English courts—while they have been steadily breaking away from many points of the common law doctrine —in the light of the words of Lord Justice Lindley, and the unreversed case of *Ward* v. *Byrnes*, we think they would have refused to grant the injunction in this case.

DOWER: EFFECT OF RE-MARRIAGE ON WIDOW'S RIGHT.—The case of Brown's appeal, 44 Atl. Rep. 22, (1899), is an interesting résumé of the effect of divorce on a widow's right of dower. The appellant claimed dower in her deceased husband's estate under the following facts: Lucius D. Brown had been divorced from the appellant (she being the innocent party) and both subsequently married. The second wife of the decedent was still living and also the second husband of the appellant. When the decree of divorce was granted the appellant had not received any provision by way of jointure, had entered into no agreement with the decedent in respect of her property rights, received no alimony, nor had she in any way forfeited her right of dower if such right exists under such circumstances. The property in which the appellant claimed dower was acquired subsequent to the decedent's second marriage. Judge Hamersley, in delivering the opinion of the court, reviews the law of marriage, divorce, land, descent and distribution as it existed in Connecticut from the settlement of the State down to the present time; but the decision, however, rests upon a recent statute which provides that "where a wife is absent from a husband with his consent, or through his mere default, . . . in case of divorce, where she is the innocent party, if no provision has been made for her, after the death of the husband, she shall be entitled to have dower in his lands." "But," the court said, "It is certain that a woman divorced is admitted to dower only because she represents, and no other is, the wife living with her husband, or separated through his fault. In this case the much-married man has left a widow, and, under the statute she, and no other, is entitled to dower."

This case is unique and raises some nice questions for discussion. The general rule in this country is that where there is a divorce a *vinculo matrimonii* the dower right of the divorced woman is barred absolutely whether she be innocent or not, or whether the husband has re-married or not. When the divorce is a *mensa et thoro* the majority of courts hold that the right to dower is not barred.

In the case under discussion the court cited the case of *Stilson* v. *Stilson*, 46 Conn. 15, (1878), where it was held that a divorced wife has dower right in her husband's estate provided he has not re-married, since she is then his widow although living apart from him through his fault. Her right of dower, the court said, "is precisely the same as that of a woman living with her husband at the time of his death."

There seems to be no question but that a wife's dower right is barred when she is in fault and a divorce "*a vinculo*" is granted. Also her right may be barred by her adultery and elopement but under some statutes elopement is necessary in order to bar her right. In *Cogswell* v. *Tibbetts*, 3 N. H. 41 (1824), it was said: "It is very clear under this statute there could be no forfeiture without what is denominated an elopement. And to constitute an elopement, the wife must not only leave the husband, but go beyond his actual control. For if she abandon the husband, and goes and lives in adultery, in a house belonging to him, it is said not to be an elopement."

In *Thayer* v. *Thayer*, 14 Vt. 107 (1842), the court said, "That the widow is barred of any claim, by reason of her having left her husband before his death, cannot be sustained. The evidence tends to show that the separation was, in the end, by the mutual consent of husband and wife. Be this as it may, there is nothing in the evidence that can bar the widow's right of dower, or her right to a distributory share. Though the wife might have been indiscreet, and have left the husband without a justifiable cause, still this would not work a forfeiture of her rights."

There seems to be a conflict in the decisions with regard to whether the husband re-marry or not. Some courts hold that a wife, though divorced, is still the wife for the purpose of receiving dower as long as he has taken no other wife to fill her place. This, we think, is a distinction which ought not to be made. If the husband is in fault, the court should at the time of the granting of the decree of divorce make him provide for his injured wife and not allow her to wait until after his decease to put in a claim for dower, when it will, necessarily, be much more difficult to ascertain who was really in fault. Such a doctrine, if adopted, would render the interpretation of statutes on the subject of dower uniform and put an end to useless suits. With regard to any property which the husband may acquire after the divorce, she can have no claim to and could not, reasonably, expect to get dower. When the divorce was granted it was at her request, she then received alimony in lieu of dower, and should rest content with a reasonable settlement out of the then estate of her husband. In *Miltimore* v. *Miltimore*, 40 Pa. 151 (1861), it was held that where a divorce "*a vinculo*" had been granted at the request of the wife, although the granting was irregular, she was, nevertheless, estopped from claiming dower by setting up the irregularity.

Where the decree of divorce is merely "*a mensa et thoro*" the wife's right to dower is not barred even though the divorce was granted at her request. In *Amer. Legion of Honor* v. *Smith*, 45 N. J. Eq. 466 (1889), the court said, "The decree of divorce *a mensa et thoro* did not dissolve their marriage bond. Though separated by the decree from his bed and board, Hannah still remained the wife of Henry Smith, and retained all the property rights incident to that relation to him, and on his death she became his widow, and as such succeeded to all the rights in his property which the law gives a widow in the property of her husband on his death. The only effect of such divorce, where common law prevails, is to compel them to live apart, and to deprive the husband of his control over his wife."

In conclusion it may be said that, generally, where a divorce *a vinculo matrimonii* has been granted, the wife loses all property rights in the estate of her husband; if the divorce is only from bed and board the property rights are not affected. This seems the most rational rule and the one calculated to avoid useless litigation.

CRIMINAL LAW: REVERSAL OF SENTENCE; DOUBLE JEOPARDY.—In the case of *Commonwealth* v. *Murphy*, 54 N. E. 860, (1899), the defendant appealed to the Supreme Court of Massachusetts from a sentence passed on him by the Superior Court of that State, claiming that he was by it placed a second time in "jeopardy of life and limb." His contention was based on the following state of facts: The crime of which he was convicted was made statutory by an Act subsequent in time to the commission of the crime itself. He was indicted, found guilty and sentenced in accordance with the provisions of the Act. It was subsequently held that the statute under which he was sentenced was unconstitutional so far as it related to past offences. On an appeal brought by the prisoner his sentence was reversed, and he was remanded to the Superior Court for sentence according to the law as it was when the offence was committed. He, meanwhile, served two and one-half years of his original sentence, and this time, together with the period of the second sentence, amounted a greater time than that of his first sentence.

He appealed from the second sentence, contending that by it he was placed twice in jeopardy, and deprived of his constitutional rights. The Supreme Court of Massachusetts, however, held that, since he was not to be placed on trial a second time, he would not be put twice in jeopardy, and that, "though the effect of the re-sentence will be to compel the defendant to suffer solitary confinement twice, and will result in his actual confinement for a longer period than the term for which he was originally sentenced, we do not see . . . . that the last sentence is rendered invalid thereby."

Blackstone says it is a "universal maxim of the com-

mon law of England that no man is to be brought into jeopardy of his life more than once for the same offence," (Bl. Com. IV, 335), and this extends to all offences, capital or otherwise. The principles of law reached in the various jurisdictions from this maxim as a basis are very nearly in accord. When a person has been, in due form of law, tried upon a good and sufficient indictment, and convicted or acquitted, that, conviction or acquittal may be pleaded in bar to a subsequent prosecution, within the same jurisdiction, for the same offence: May. Crim. Law, 117. And even if the indictment be insufficient and the proceedings be irregular, so that a judgment thereon might be set aside upon proper process, yet if the sentence thereunder has been acquiesced in by and executed upon the convict, such illegal and voidable judgment constitutes a good plea in bar. *Com.* v. *Loud*, 3 Met. 328 (1841). But where the prisoner himself seeks to have the sentence reversed, as where he is convicted by a misdirection of the judge on point of law, or by misconduct on the part of the jury, in such case if he has the verdict set aside, he may again be sent to the bar. *Reg.* v. *Deane*, 5 Cox, C. C. 501 (1851); *Com.* v. *Green*, 17 Mass. 515 (1822).

So in the case in point, the prisoner himself sought to have the original sentence reversed, and could therefore be lawfully re-sentenced.

In New York the case of *McKee* v. *The People*, 32 N. Y. 245 (1865), held that a person is said to be put in jeopardy only when he is tried a second time upon a criminal accusation, but that the term has no relation to the reversal of the erroneous judgment and pronouncing a legal one, pursuant to a legal conviction. In England, *Reg.* v. *Drury*, 3 Car & K. 193 (1849), holds that a judgment and sentence reversed are the same as if there had been no judgment and sentence, and this must be so even if the prisoner has served part of the sentence. See, also, *Rex* v. *Bourne*, 7 Adol. & E. 58 (1837); *Rex.* v. *Ellis*, 5 Barn. & C. 395 (1826).

The Pennsylvania courts, and the majority of the tribunals in the United States, hold with *Reg.* v. *Drury* that it would be shocking to both "justice and common sense that individuals, who object only that they have been regularly found guilty of an offence on a lawful trial, but that there has been a mistake in the judgment pronounced, which judgment has on that ground been reversed, and can never be carried into effect, should therefore remain exempt from all punishment."

"&c."

Each of the Judges of the Orphans' Court of the County of Philadelphia has a task like that of Sisyphus, who rolled the stone to the top of the hill only to find that it always returned to the bottom. Each first Monday of the month in term time

finds the audit list, with its bulk of accounts, just as insistent as was its like four weeks before. In addition to this "endless chain" there are the demands of the motion and argument lists. It is strange that one who is so occupied can find time or take pleasure in legal study not immediately "*pro re nata*" in the actual business of the Court. It is, however, to the learning and kindness of a member of that bench, whose scholarship never grows weary, that the writer is indebted for some instances of the use of the above abbreviation. Inapt and unmeaning as it may seem, when the supposed precision of legal expression is considered, it is woven into the text of a great writer and into the most familiar forms of pleading.

Notably and deliciously quaint is this from Coke on Littleton:

"Of Fee Simple."

17 b "'*In such manuall occupation, &c.*' There is nothing "in our author but is worthy of observation. Here is the "first (&c.) and there is no (&c.) in all his three bookes (there "being as you shall perceive very many), but it is for two pur- "poses. First, it doth imply some other necessary matter. "Secondly, that the student may, together with that which "our author has said, inquire what authorities there be in law "that will treat of that matter, which will work three notable "effects; first, it will make him understand our author the "better: secondly, it will exceedingly adde to the reader's "invention: and lastly, it will fasten the matter more surely in "his memory; for which purpose I have for his ease in the "beginning set downe, in these Institutes, the effect of some "of the principal authorities in law, as I conceive them con- "cerning the same."

Again:

140 b "'*Because of his younger age, may least of all his breth- "ern helpe himselfe, &c.*' Here by (&c.) are implyed those "causes wherefore a youth is lesse able to ayd himselfe, &c. "which the poet briefly and pithily expresseth thus:

"Imberbis juvenis, tandem custode remoto,
"Gaudet equis, canibusque, et aprici gramine campi,
"Cereus in vitium flecti, monitoribus asper,
"Utilium tardus provisor prodigus aeris,
"Sublimis, cupidusque, et amata relinquere pernix.

"And againe, no living creature more infirme than man:

"Nil homine infirmum tellus animalia nutrit
"Inter cuncta magis.—"

How many practitioners in drawing petitions have inquired the meaning of the "&c." in the oft-written conclusion "And your petitioner will ever pray, &c."? Doubtless every one has

deemed it an invocation of blessing on the Court, but it is interesting to note some examples of the ancient phraseology. The abbreviation, however, has been employed for many years—for centuries indeed.

In "Cursus Cancellariae," or the Course of Proceedings in the High Court of Chancery, London 1715, the modern form is given v. p. 69, 330, 331, "And your petitioner shall ever pray, &c."

In the preface to "Aeta Cancellariae," or Selections from the Records of the Court of Chancery, London, 1847, the author, Cecil Munro, one of the Registrars of the Court, states that the papers contained in the volume "have been extracted, with one exception, from documents remaining as of record in the Report office of the Court of Chancery; where they have lain probably untouched for considerably more than two centuries." A petition of Sir William Wogan, Knight, in Barlow *vs.* Wogan (M. T. 1611) is given on p. 156, praying the Lord Chancellor to grant the petitioner "ease of this, his punishment." It ends with the familiar "and he shall daily pray, &c." and there are like instances of the use of this form. There are, however, several cases of the extended form of this prayer. Thus on p. 267 (1619) "And your petitioner as in duty bound shall daily pray for your Lordship's long life." On p. 294 (1620) "Shall ever pray for your Honor." On p. 270 (1619) . . . "for which your petitioner will ever pray for your Lordships endless happiness."

An amazing compilation is to be found in "Calendars in Chancery of Queen Elizabeth," printed by order of the record commissioners. Prefixed to the calendar is a selection of bills and petitions of dates anterior to Queen Elizabeth's reign. In the appendix to that "excellent little book," "Haynes Outlines of Equity" (288) there is a bill, taken from the Calendars in Chancery, which shows in full what the subsequent "&c." meant; *i. e.*, in substance, for the prayers of benison at the end of ancient petitions in equity varied in phrase. These words appear, inter alia, "And she shall pray God for yo^{w}"—Vol. 1, p. Xli (Reign of Henry VI). On the same page "And yo^{r} said pore orato^{r}s shall ev p^{a}y to God for yo^{r} good Lordship." —"said suppl^{r} shall according to his bounden duty, daily pray to Almighty God for y^{r} p^{r}servacon of y^{r} h^{is} health long to continue." 1595—Id. CXliv (Reign of Elizabeth).

Illustrations might be multiplied, *e. g.*, Thomas *vs.* Pierce, 1 Chester Co. Rep. 403, which explains the expressions "when, &c.," and "under which, &c.," in the ordinary forms of avowry and cognizance of rent in arrear in actions of replevin, but the foregoing are sufficient as a matter of interest.

J. W. P.